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Supreme Court, U.S.
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No. 10-

09-942

IN THE

SUPREME COURT
OF THE UNITED STATES

CORTEZ-URQUILLA,
PETITIONER

v.

MICHAEL MUKASEY,
RESPONDENT

On Petition for a Writ of
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Two issues are raised in this Writ of Certiorari.

The first issue is whether Ms. Cortez received a fair hearing in Immigration Court. This issue is raised in light of the fact that the Notice to Appear – the charging document that placed Ms. Cortez in removal proceedings, did not contain the date and time of the next hearing, the Immigration Court did not inform her of the upcoming hearing and she was ordered removed.

The second issue raised in this Writ of Certiorari is whether Ms. Cortez received a fair hearing in the Fifth Circuit Court of Appeals.

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Petitioner, Ms. Cortez, respectfully request that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Ms. Cortez entered the United States on August 16, 2004 without proper documents and was issued a Notice to Appear. The Notice to Appear is a charging document used to commence removal proceedings. 8 U.S.C. § 1229(a). The Notice to Appear must contain of relevance to this case and the subject of the administrative litigation, a date and time "at which proceedings will be held." 8 U.S.C. § 1229(a)(1)(G). The Notice to Appear served on Ms. Cortez did not contain that information. Simply, the Notice to Appear stated date and time "to be set."

As Ms. Cortez was unaware of her next hearing date, the Immigration Judge, sitting in San Antonio, Texas, ordered Ms. Cortez removed from the United States.

Ms. Cortez filed a motion to reopen removal proceedings. The basis of the motion was that under 8 U.S.C. § 1229a(b)(5)(C)(ii), the Immigration Court is authorized to reopen removal proceedings if the alien did not receive proper notice. [Appendix A]. The Immigration Judge denied the motion. Reasoning that Ms. Cortez was not required to receive notice because she did not file a change of address, the Immigration Court ordered Ms. Cortez removed in her absence. Id.

Ms. Cortez filed an administrative appeal to the Board of Immigration Appeals. The Board of Immigration

Appeals agreed that Ms. Cortez was not entitled to notice of her hearing because she did not provide an address to the Immigration Court.

The Board of Immigration Appeal's decision became the final agency adjudication. [Appendix B]. Ms. Cortez retained the services of Mr. Michael Hadeed to file a Petition for Review. Although the Immigration Judge denied the motion to reopen in San Antonio, Texas and San Antonio, Texas belongs to the Fifth Circuit judicial district, Mr. Hadeed filed the Petition for Review in the Fourth Circuit Court of Appeals. Filing the Petition for Review in the Fourth Circuit was erroneous. Congress specifically stated that Petitions for Review must be filed in the "judicial circuit in which the immigration judge completed proceedings." 8 U.S.C. § 1252(b)(2).

Because the Petition for Review was filed in the improper forum, the Office of Immigration Litigation filed a motion to dismiss this case. Facing this motion, Mr. Hadeed withdrew from the case and current counsel entered his appearance. Ms. Cortez, through current counsel, argued that the issue is venue and not lack of jurisdiction and the Fourth Circuit Court of Appeals should change venue to the Fifth Circuit Court of Appeals. The Fourth Circuit Court of Appeals agreed and changed venue to the Fifth Circuit Court of Appeals.

In October 2008, the Fifth Circuit Court of Appeals set forth a briefing schedule. However, instead of notifying current counsel of the briefing schedule, the Fifth Circuit mistakenly notified Mr. Hadeed, an attorney who had withdrawn from the case. The brief had to be filed by December 2008. Mr. Hadeed was facing his legal problems. On November 19, 2008, Mr. Hadeed was indicted in the United States Court for the Eastern

District of Virginia for immigration fraud. Mr. Hadeed was convicted of the charges on February 13, 2009.

Because current counsel was not notified of the briefing schedule a brief was not filed in this case. The Fifth Circuit Court of Appeals dismissed the Petition for Review precisely because Ms. Cortez failed to file a brief. [Appendix C].

Upon learning of the dismissed appeal, current counsel telephone the Office of Immigration Litigation (OIL) about filing a joint motion to reinstate the Petition for Review. OIL did not oppose the motion. The motion stated that current counsel was not notified of the briefing schedule and that Mr. Hadeed received notice of this case. The motion also contained the order from the Fourth Circuit Court of Appeals permitting Mr. Hadeed to withdraw from this case.

Although Ms. Cortez filed an unopposed motion with the Fifth Circuit Court of Appeals to reinstate the Petition for Review and create a new briefing schedule, the Fifth Circuit refused to reinstate the Petition for Review and denied the motion. [Appendix D].

Ms. Cortez files this Writ of Certiorari.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This Court may review a final decision from the Court of Appeals.

This case touches on the cornerstone of U.S. jurisprudence – the right to a fair hearing. Ms. Cortez raised the issue that she did not receive an administrative

hearing in the Immigration Court and the Board of Immigration Appeals. In the Fifth Circuit Court of Appeals, the Court sent the briefing schedule to the wrong attorney. When the mistake was discovered and Ms. Cortez sought to reinstate the Petition for Review, she was denied the right to be heard at the forum as well.

The Board of Immigration Appeals was conferred jurisdiction under 8 C.F.R. § 1003.3(a). Under that regulation, the Board of Immigration Appeals possesses jurisdiction to review decisions from the Immigration Court.

The Board's decision was the final administrative decision and subject to review under 8 U.S.C. 1252. The United States Court of Appeals for the Fifth Circuit took jurisdiction pursuant to 8 U.S.C. Section 1252(b)(9). Under this section, Congress authorized Circuit Courts within the jurisdiction of the Immigration Court to "[r]eview . . . all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any other action taken or proceeding brought to remove an alien from the United States . . " *Id.*

The Fifth Circuit Court of Appeals dismissed the Petition for Review. As stated previously, neither Ms. Cortez, nor present counsel, were aware of the dismissal. Instead, the order dismissing the case was received by Michael Hadeed. In fact, when counsel learned of the dismissal, counsel filed a motion to reinstate the Petition for Review, which was denied on September 9, 2009. This Writ follows.

This Court possess jurisdiction to review an adverse decision under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This petition for a Writ of Certiorari raises the issue of what constitutes a fair hearing. The concept of a fair hearing is deeply grounded in the Fifth Amendment's Due Process Clause. However, the issue of whether Ms. Cortez received a fair hearing turns on statutory, not constitutional interpretation.

Three notice statutes are involved in this case. The first statute governs the contents of the "Notice to Appear," the charging document which places an immigrant in removal proceedings and the second involves the Immigration Judge's authority to proceed in absentia.

Congress enacted 8 U.S.C. § 1229(a)(1)(G). This section governs the contents that a Notice to Appear must contain. Under this section of the United States Code, Congress stated that a Notice to Appear must contain the "time and place" of the initial hearing.

The second notice statute is 8 U.S.C. § 1229(a)(1)(F). This section of the United States Code places an affirmative duty on aliens to provide the Attorney General with the address and telephone number of the alien "respecting proceedings under section 1229a of this title."

The third statute involved in this case is 8 U.S.C. § 1229(a)(2)(B). Under this section of the United States Code, the Immigration Court is authorized conduct an in absentia hearing and remove an alien from the United States without notifying the alien of the hearing if the

alien has failed to provide "the address required under paragraph (1)(F)."

In federal court, what was litigated is the scope of Federal Appellate of Procedure Rule 2 and the Fifth Circuit Court of Appeals Local Rule 27.1.6. Under the Federal Rules of Appellate Procedure, a Court is authorized to "relieve litigants of the consequences of default judgment where manifest injustice would otherwise result." *Valbrun v. Hogan*, 439 F.3d 136 n.1 (2nd Cir. 2006), citing *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452 (2nd Cir. 1998), rev'd in part on other grounds, 493 U.S. 120.

STATEMENT OF THE CASE

This case arises out of an in absentia removal order issued by the Immigration Judge in San Antonio, Texas. It is conceded and not in dispute that Ms. Cortez entered the United States without proper documentations. At the time of entry, Ms. Cortez was detained and issued a Notice to Appear. It is plain from the charging document that the Department of Homeland Security did not inform Ms. Cortez of the time and place of her removal hearing. In fact, the Notice to Appear states that the next hearing is to be determined.

The Department of Homeland Security released Ms. Cortez without obtaining a forwarding address from her. This is plain from the Notice to Appear, which states that Ms. Cortez "failed to provide U.S. address." Thus, without knowing how to locate Ms. Cortez after her release from detention, DHS filed the Notice to Appear with the Immigration Court. The Immigration Court could not notify Ms. Cortez of her next hearing as the Court was unaware of her whereabouts. Knowing that

Ms. Cortez was unaware of her next court hearing, the Immigration Court should have terminated removal proceedings against her. After all, she never received notice of her removal hearing. However, the Immigration Court proceeded in her absence and ordered her removed from the United States.

Congress created a process for aliens to reopen their removal cases if such removal was without notice. Pursuant to 8 U.S.C. § 1229a(b)(5)(C), Congress authorized aliens to file a motion to reopen if the alien did not receive proper notice of the removal hearing. In this case, there is no dispute that Ms. Cortez was not notified of her removal hearing; rather, the dispute turns on whether Ms. Cortez had an affirmative obligation to inform the Immigration Court of her new address.

Ms. Cortez believes she does not have an affirmative obligation to inform the Immigration Court of her address. This belief turns on whether Ms. Cortez was properly placed in "removal proceedings."

It is well settled that the filing of a Notice to Appear in Immigration Court commences removal proceedings. 8 C.F.R. § 1003.14(a). What is not well settled is whether the filing of a defective Notice to Appear commences removal proceedings. Ms. Cortez believes that removal proceedings cannot commence against her until a Notice to Appear, a charging document which complies with the formalities Congress set forth in 8 U.S.C. § 1229a, is properly filed with the Immigration Court.

Ms. Cortez is cognizant of the fact that a Notice to Appear may be filed in Immigration Court without informing an alien of the date and time of the next

hearing. After all, the DHS does not possess the onerous burden of not only informing aliens of the charges levied against them, but also of keeping track of the Immigration Court's schedule. However, either the DHS or the Immigration Court must notify Ms. Cortez of her next hearing. There is support for this theory. In *Debabneh v. Gonzales*, 471 F.3d 806 (7th Cir. 2006), the alien attempted to terminate removal proceedings because DHS issued a defective Notice to Appear. After issuing a defective Notice to Appear, the Immigration Court informed the alien of his next hearing by mailing the alien a Notice of Hearing. In the Notice of Hearing, the Immigration Court informed the alien of the date and time of the next hearing.

Refusing to terminate removal proceedings, the Seventh Circuit Court of Appeals held that the "fact that the government fulfilled its obligation under INA Section 239(a) in two documents – rather than one – did not deprive the IJ of jurisdiction to initiate removal proceedings." Id at 809.

Ms. Cortez believes that the holding in *Debabneh* is correct. The fact that the DHS filed a defective is not fatal to the government's case. Either the DHS or the Immigration Court could inform Ms. Cortez of her removal hearing. However, unlike the alien in *Debabeneh* who actually received notice of his hearing, Ms. Cortez was never notified.

The holding in *Debabneh* has been widely accepted. In the Fifth Circuit Court of Appeals, the judicial circuit where this case arises, the Court held that a Notice to Appear does not need to state the time and date of the next hearing; that information may be provided in the Notice of Hearing mailed by the Immigration Court.

Gomez-Palacio v. Holder, 560 F.3d 354, 359 (5th Cir. 2009). See also *Popa v. Holder*, 571 F.3d 890, 895 (9th Cir. 2009) holding "this court has never held that the NTA cannot state that the time and place will be set at a future time by the Immigration Court. This Court silently adopted the rule that the time and place of removal proceeding can be sent after the notice to appear."

These cases reflect the common sense rule that the Notice to Appear is not defective if the alien receives subsequent notice of the hearing; however, if the alien never receives notice of the hearing because the Notice of Hearing is not mailed to the alien, removal proceedings must be terminated.

The Immigration Court and the Board of Immigration Appeals held that Ms. Cortez was not entitled to receive notice of her removal hearing. Both administrative tribunals interpreted 8 U.S.C. § 1229(a)(1)(F) as placing an affirmative obligation on Ms. Cortez to notify the Immigration Court of her new address. Thus, the administrative tribunals held that because Ms. Cortez did not notify the Immigration Court of her new address, the Immigration Judge was permitted under 8 U.S.C. § 1229(a)(2)(B) to proceed against her without notifying her of the removal hearing.

8 U.S.C. § 1229(a)(1)(F) places an affirmative obligation on aliens to notify the Immigration Court of the alien's address "respecting proceedings under section 1229a of this title." Proceedings under § 1229a of 8 U.S.C. are removal proceedings. Thus, for 8 U.S.C. § 1229(a)(1)(F) to be triggered two events must occur – first Ms. Cortez must be placed in "removal proceedings" and second she must have a new address. As Ms. Cortez believes that she was never properly placed in "removal

proceedings" because she was issued a defective Notice to Appear, the first condition required under 8 U.S.C. § 1229(a)(1)(F) is not triggered. Therefore, Ms. Cortez believes she does not have an affirmative obligation to contact the Immigration Court of her new address.

The administrative tribunals bypassed the issue of whether Ms. Cortez had an affirmative obligation to contact the Immigration Court of her new address and simply held that under 8 U.S.C. § 1229(a)(2)(B), the Immigration Judge is authorized to proceed against Ms. Cortez without notification of her hearing because she failed to file a change of address form under 8 U.S.C. § 1229(a)(1)(F).

Relying on 8 U.S.C. § 1229(a)(2)(B) to proceed against Ms. Cortez in her absence is problematic for two reasons. First, 8 U.S.C. § 1229(a)(2) governs notice of aliens who are in "removal proceedings." Ms. Cortez believes that she was never properly placed in removal proceedings because of the defective nature of the Notice to Appear. Second, 8 U.S.C. § 1229(a)(2) governs the "any change or postponement in the time and place" of the removal proceedings. In this case, the Immigration Court did not "change or postpone" removal proceedings. Instead, Ms. Cortez was ordered removed in her first hearing.

Ms. Cortez filed a Petition for Review. The briefing schedule was mailed to Mr. Hadeed, an attorney who was granted permission to withdraw from the case and who was under investigation for committing immigration fraud. Neither Mr. Hadeed nor the Fifth Circuit Court of Appeals notified current counsel of the briefing schedule. The Fifth Circuit Court of Appeals dismissed this case as a result of not filing a brief.

As soon as Ms. Cortez learned that the case was dismissed, Ms. Cortez filed an unopposed motion to reinstate the Petition for Review. The Fifth Circuit denied that motion as well.

Petitioners now seek review by this Court.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED. THIS CASE RAISES AN ISSUE OF UTMOST IMPORTANCE IN STATUTORY CONSTRUCTION – THE RIGHT TO A FAIR HEARING. THE CIRCUIT COURTS HAVE NOT SQUARELY ADDRESSED THE ISSUE OF WHETHER THE IMMIGRATION COURT MAY REMOVE AN ALIEN WITHOUT NOTICE UNDER 8 U.S.C. § 1229(a)(2)(B).

The longstanding principle that a person has a right to a fair hearing is well established. In *Mullane v. Hanover Trust Co*, 339 U.S. 306, 309 (1950), this Court held that notice of the hearing must be "reasonable calculated" to reach the affected party. The Board of Immigration Appeals has repeatedly and recently incorporated the *Mullane* holding into the body of immigration law. See for example, *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002); *Matter of G-Y-R-*, 23 I&N Dec. 181, 186 (BIA 2001); *Matter of C-R-C-*, 24 I&N Dec. 677, 679 (BIA 2008).

In *Mullane*, this Court conducted a due process analysis in deciding whether Petitioners received a fair hearing. In this case, Ms. Cortez challenges the interpretation of a statute. However, this Court held in

Clark v. Martinez, 543 U.S. 371, 380-381 (2005) that given two interpretations of a statute, Courts must employ the interpretation which avoids "constitutional problems."

Thus, in interpreting three concepts – first whether the Notice to Appear is defective, second whether Ms. Cortez possesses an affirmative duty to inform the Immigration Court of her new address and third, whether the Immigration Court is authorized to issue a removal order against her without any degree of notice – this Court's *Mullane* holding must govern.

The Notice to Appear is defective. Congress specifically stated that the Notice to Appear must contain a date and time of the removal hearing. In *Debabneh*, the Seventh Circuit Court of Appeals held that the Notice to Appear in that case was not defective because the alien received notice of the hearing as a result of mailing the Notice of Hearing. The cases that follow *Debabneh* stand for the same proposition – as long as the alien obtains notice of the hearing, either via the Notice to Appear or the Notice of Hearing, the government complies with 8 U.S.C. § 1229(a)(1)(G). Even the Board of Immigration Appeals, in its published decision, has held that an alien must be notified of the hearing. In *Matter of M-D-*, 23 I&N Dec. 540, 543 (BIA 2002), the Board explicitly prohibited Immigration Judges from issuing orders of removals of aliens unless the DHS "[e]stablishes by clear, unequivocal, and convincing evidence that the alien is removable and that written notice of the time and place of proceedings and the consequences of failure to appear were provided to the alien or to the counsel of record."

Although the case law establishes that aliens must receive notice of the hearing, albeit in the Notice to Appear or the Notice of Hearing, there are no published

cases that stand for the proposition that filing a defective Notice to Appear and not curing the defect of the Notice to Appear by mailing the alien the Notice of Hearing suffices to appraise the alien of her next hearing.

The reason for this lack of legal authority is precisely because of this Court's holding in *Mullane*. After all, to comply with due process requirements of a fair hearing, notice must be reasonably calculated to reach Ms. Cortez. In fact, conducting an in absentia hearing without notifying the alien of his court hearing is a denial of due process. *U.S. v. El Shami*, 434 F.3d 659, 664 (4th Cir. 2005).

The Immigration Judge's and the Board of Immigration Appeals' holding that Ms. Cortez was not entitled to receive notice because she did not notify the Immigration Court of her new address is misplaced for two reasons.

First, the change of address requirement contained in 8 U.S.C. § 1229(a)(1)(F) only governs aliens who are in "removal proceedings." As removal proceedings are commenced with the filing of a Notice to Appear with the Immigration Court, and in both published administrative opinions and federal court decisions, tribunals have repeatedly held that aliens must be notified of their hearings, Ms. Cortez was never properly placed in removal proceedings.

There is authority to support the contention that Ms. Cortez was not required to file a change of address as she was not placed in removal proceedings.

Even if the Board of Immigration Appeals correctly interpreted that the filing of a defective Notice to Appear

with the Immigration Court suffices to commence "removal proceedings," the Immigration Judge was nonetheless prohibited from ordering Ms. Cortez removed pursuant to 8 U.S.C. § 1229(a)(2)(B). 8 U.S.C. § 1229(a)(2) governs the Immigration Judge's authority to proceed against an alien in absentia. Under this section of the United States Code, written notice of the date and time of the next hearing must be mailed either to the alien or counsel of record. If the alien has not filed a change of address pursuant to 8 U.S.C. § 1229(a)(1)(F), Congress authorized the Immigration Court to conduct an in absentia hearing. However, under 8 U.S.C. § 1229(a)(2), the Immigration Court is authorized to conduct an in absentia hearing in "removal proceedings" "in the case of any change or postponement" of the initial hearing.

In this case, Ms. Cortez never requested a change or postponement of the initial hearing as Ms. Cortez was unaware of the hearing. Therefore, under the plain reading of the statute, the Immigration Court was without authority to conduct an in absentia hearing.

What is at stake in this case is the government's right to commence removal proceedings with a defective hearing, not notifying the alien of her time and place in immigration court, and order her remove from the United States without her knowledge. This process or lack of process offends the fundamental notions of a fair hearing. It is impermissible under this Court's *Mullane* holding and therefore invalid. At a minimum in the administrative process, Ms. Cortez must have the right to be notified of her initial court hearing and be permitted to present any defenses from removal. As she was deprived of this right, a right set forth by Congress, the Immigration Judge and the Board of Immigration

Appeals exceeded their authority under the statute to order her removed. As such, granting this Writ is proper.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S DECISION NOT TO REINSTATE THE PETITION FOR REMOVAL MADE THE FEDERAL REVIEW PROCESS MANIFESTLY UNJUST.

It is well settled that the Fifth Circuit may reinstate the Petition for Review if the dismissal of the appeal results in a "manifest injustice." See Federal Rules of Appellate Procedure 2, *Valbrun v. Hogan*, 439 F.3d 136 n.1 (2nd Cir. 2006).

Courts have not created a uniform definition as to what constitutes "manifest injustice." "'What is clear from case law, and from a natural reading of the term itself, is that a showing of manifest injustice requires that three exist a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy.'" *Greene v. WCI Holdings Corp., et. al*, 136 F.3d 313, 316 (2nd Cir. 1998), citing *International Union United* v. *Bunting Bearings Corp., et al.*, 321 B.R. 420, 423 (N.D. Ohio 2004).

Ms. Cortez and current counsel acted properly throughout these hearings. Counsel entered his appearance with the Fourth Circuit Court of Appeals; filed an opposition to the motion to dismiss. In both the entry of appearance as well as the motion opposing the motion to dismiss, current counsel informed the Court of the correct address, telephone number and e mail to be reached. Nonetheless, the Fifth Circuit erroneously mailed the briefing schedule to Mr. Hadeed.

Although an analysis of what is "manifestly unjust" is case specific, there is relevant case law. In *Musler v. Georgeff*, 212 F.R.D. 287, 288-89 (D.C. Md. 2003), the United States District Court for the District of Maryland held that it would be "manifestly injustice to deny AXENT the opportunity to recoup its costs in defending this action without an opportunity to brief the issue."

Thus, under the *Musler* holding, mistakenly sending Mr. Hadeed the briefing schedule and dismissing the case is manifestly unjust. However, this case has two aggravating factors which makes the judicial review process more unjust than the *Musler* holding.

First, in this case, the sole reason for denying the Petition for Review was that a brief was not timely filed. As is evident from the record, the brief was not timely filed because of an error arising out the Fifth Circuit Court of Appeals, not because of any delay caused by Ms. Cortez. Therefore, to create a briefing schedule, mail it to the wrong attorney, dismiss the Petition for Review on grounds that a brief and refuse to reinstate the Petition for Review, which was dismissed because of an error arising from the Fifth Circuit Court of Appeals squarely falls within the concept of what is manifestly unjust.

There is a second aggravating factor which makes the Petition for Review process manifestly unjust. The briefing schedule was sent to an attorney who was indicted and convicted for immigration fraud. Although the conviction occurred after the termination of the briefing schedule, during the briefing schedule a grand jury indicted the attorney.

These two factors – the fact that the Fifth Circuit Court of Appeals erroneously mailed the briefing schedule to the wrong attorney coupled with the fact that the attorney was under indictment during the briefing schedule, makes the process Ms. Cortez received fundamentally unfair.

CONCLUSION

At the core of this case is Ms. Cortez' s right to be heard. This is a right that Ms. Cortez has been litigating in both the administrative agency and federal court.

Within the Executive Office for Immigration Review, Ms. Cortez believes she has a right to defend against the charges contained in the Notice to Appear. The government tilted the playing field against Ms. Cortez. The government issued a Notice to Appear stating that her date and time of her removal hearing would be determined. The government did not obtain a forwarding address. As such, the government was unable to send her the Notice of Hearing. Thus, without notice, the government moved to remove Ms. Cortez in her absence. The Immigration Judge, misinterpreting the statute which governs in absentia proceedings, ordered Ms. Cortez removed.

When Ms. Cortez believed that she would seek review and a fair hearing in the federal judiciary, the playing field was again tilted against her. Instead of notifying her attorney of the briefing schedule, the Fifth Circuit notified prior counsel. Prior counsel did not notify present counsel of the briefing schedule. Because a brief was not filed in this case, the Fifth Circuit Court of

Appeals dismissed the Petition for Review. When Ms. Cortez moved to reinstate the Petition for Review in light of the fact that she was not notified of the briefing schedule, the Fifth Circuit denied the motion.

In sum, after years of requesting a hearing before a tribunal, albeit administrative or Article III Courts, Ms. Cortez files this Writ.

This Writ should be granted. Ms. Cortez has not had a fair hearing in either Immigration Court or the Fifth Circuit Court of Appeals.

The issues raised in this case are of utmost importance to the administration of a fair administrative hearing process. Ms. Cortez believes that at a minimum, prior to facing removal, aliens must receive proper notice of their hearing.

Respectfully submitted,

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APPENDIX

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APPENDIX A – OPINION OF THE UNITED STATES IMMIGRATION COURT
DECIDED JUNE 25, 2006

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA, SUITE 300
SAN ANTONIO, TX 78207

Case Number A98 486 507

IN THE MATTER OF JASMIN ESMERALDA) CORTEZ-URQUILLA, also known as Lidia Marina Cortez-Urquilla, Respondent	) IN REMOVAL) PROCEEDINGS) DOCKET: San) Antonio (non-) detained))

Charge: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, alien present in the United States without being admitted or paroled after inspection by an immigration officer.

Application: Motion to Reopen, Motion to Change Venue, and Motion for Emergency Stay of Removal.

On Behalf of the Respondent: Ethan Beattie, Esq.
313 N. Glebe Rd., Ste. 200
Arlington, VA 22203

On Behalf of Immigration and Customs Enforcement:
Chief Counsel
P.O. Box 1939
San Antonio, TX 78297

WRITTEN DECISION OF THE IMMIGRATION JUDGE

PROCEDURAL HISTORY

Respondent was a 21-year-old female. Record of Proceedings ("ROP") Exhibit 2. The Department of Homeland Security ("DHS") personally served her with a Notice to Appear ("NTA") alleging that she was a native and citizen of El Salvador who entered the United States at or near Eagle Pass, Texas on or about August 16, 2004. ROP Exhibit 1. She was charged with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("the Act"), as amended, in that she was present in the U.S. without being admitted or paroled after inspection by an immigration officer. *Id.*

The charging document contains a section titled "Failure to appear," which specifies *inter alia*, that Respondent is required to provide to the Government and the Court with a full mailing address at which hearing notices will be sent. The consequences of failing to appear for any scheduled hearing were explained to Respondent in the Spanish language. ROP Exhibit 1, certificate of service block.

Respondent failed to provide an address to which the Court could send notice of a scheduled master calendar hearing. Respondent's charging document reflects "failed to provide U.S. address" (ROP Exhibit 1) as does Form I-213, Record of Deportable/Inadmissible Alien (ROP Exhibit 2). Thus, the Court could not and had

no obligation to send Respondent written notice of the calendared hearing. Section 240(b)(5)(B) of the Act; 8 C.F.R. 1003.26(d); *Matter of Villalba*, 21 I&N Dec. 842, 845 (BIA 1997).

On November 1, 2004, Respondent was neither present for the scheduled master calendar hearing nor available for examination under oath. Respondent did not provide reasonable cause for his failure to appear. At the request of DHS and as the Court knew of no exceptional circumstance for Respondent's absence, the Court preceded in absentia as mandated. Section 240(b)(5)(A) of the Act; 8 C.F.R. Section 1003.26(c).

DHS offered a Form I-213, Record of Deportable/Inadmissible Alien. ROP Exhibit 2. It establishes alienage, time, place, and manner or entry; it contains a narrative. Thus, removability as charged was established by evidence that was clear, convincing, and unequivocal. 8 C.F.R. Section 1003.26(c)(1).

Respondent was ordered removed in absentia on the lodged charge from the U.S. to El Salvador. ROP Exhibit 3.[1]

Statement of the Case

Respondent, through her attorney (ROP Exhibit 4), filed her motion to Reopen (ROP Exhibit 5), Motion for Change of Venue (ROP Exhibit 6), and Motion for emergency Stay of Removal ("Motion to Stay") (ROP Exhibit 7).

---

[1] The in absentia order and subsequently filed documents are now marked off-record for clarification.

The Government filed no reply.

The issue for the Court is whether to grant Respondent's Motion to Reopen and Motion for Change Venue. Respondent's Motion for Stay is automatic and the Court will not address it further. Section 240(b)(5)(C) of the Act; 8 C.F.R. Section 1003.23(b)(4)(ii).

STATEMENT OF LAW

Counsel's Statements

Respondent's counsel's statements are not evidence and not entitled to any evidentiary weight. See *Matter of Laureano*, 19 I&N Dec. 1, 3 n. 2 (BIA 1983), citing to *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). "[S]tatements in a brief, motion . . . are not evidence and thus not entitled to any evidentiary weighty." *INS v. Phinpathya*, 464 U.S. 183, 188-89 n. 6 (1984); *Matter of Ramirez-Sanchez* [supra].") *Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998). Nevertheless, "[l]itigants are generally bound by the conduct of their attorneys, absent egregious circumstances." *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), aff'd 857 F.2d 10 (1st Cir. 1988). Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in an official capacity binds the client just as if it were a judicial admission. *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986).

Discretion

The mere fact that Respondent may request a discretionary motion or is statutorily eligible for the relief

does not mean, *a fortiori*, that it must be granted; discretion must still be exercised. See *Matter of Gamboa*, 14 I&N Dec. 244, 248 (BIA 1972), modified on other grounds, *Matter of Torre*, 19 I&N Dec. 18 (BIA 1984), citing to *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957). Likewise, the mere fact that a party states its opposition, states its non-opposition, or fails to state an opposition which results in a presumption of non-opposition does not mean that the motion or form of relief must either be granted or denied automatically; discretion must be exercised. *Id.*

Local Operating Procedures

Pursuant to 8 C.F.R. Section 1003.40, the San Antonio Immigration Court has adopted Local Operating Procedures ("LOP"). "These rules are adopted . . . for the purpose of facilitating the convenient, efficient, and orderly conduct of the business of the Immigration Court in San Antonio, Texas { }." LOP, preamble. The undersigned routinely and consistently enforces the LOP. The consequences of failing to comply with the LOP are specified. LOP 1C. "Meaningful filing deadlines are critical to the smooth and fair administration of the Board as they are to the courts, particularly given the extraordinary volume of appeals, motions, and other filings that must be efficiently processed, tracked, and adjudicated . . . The Supreme Court has clearly held that filing deadlines must be strictly applied. *United States v. Locke*, 471 U.S. 84 (1985)." *Matter of Liadov*, 23 I&N Dec. 990, 992 (BIA 2006).

Motion to Reopen

After proper notice has been provided of a scheduled hearing and Respondent does not attend,

Respondent "shall be ordered removed in absentia. . . ." Section 240(b)(5)(A) of the Act. Pursuant to section 240(b)(5)(C) of the Act, an *in absentia* order of removal may be rescinded only: (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances; or (ii) upon a motion to reopen field at any time if the alien demonstrates that he did not receive notice in accordance with paragraph (1) or (2) of section 239(a) of the Act or the alien demonstrates that hew as in Federal or State custody and the failure to appear was through no fault of the alien's. See also 8 C.F.R. Section 1003.23(b)(ii).

A motion to reopen must be filed within 180 days of the order of removal, if the basis is an "exceptional circumstance." Section 240(b)(5)(C)(i) of the Act. "Exceptional circumstances" are those such serious illness of the alien or serous illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances beyond the control of the alien. INA Section 240(e)(1). The Court employs a "totality of the circumstances" test to determine whether exceptional circumstances are present. See *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). Nevertheless, in the interest of justice, an Immigration Judge may grant a motion to reopen based on his or her discretion. See *INS v. Doherty*, 502 U.S. 314 (1992); 8 C.F.R. Section 1003.23(b).

The Court issued the Respondent's order of removal on November 1, 2004. Respondent submitted her Motion to Reopen years later on June 4, 2007. Therefore, Respondent's motion was untimely filed and fails to meet the first component of the statutory requirement for a claim of "exceptional circumstance."

A motion to reopen may be filed at any time if "the alien did not receive notice . . . or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien." Section 240(b)(5)(C)(ii) of the Act.

Change of Venue

Venue is a matter of procedural due process. See *Matter of Seren*, 15 I&N Dec. 590 (BIA 1976). A grant or denial of a change of venue motion is within the discretion of the Immigration Judge. See *Matter of Rivera*, 19 I&N Dec. 688 (BIA 1988). Venue involves analysis of various factors affecting fairness of hearing including: administrative convenience, residence of alien, place of arrest, forum accessible to witnesses, ability of alien's attorney to be present, inconvenience and expense to government, expeditious treatment of case, and cost transporting witnesses or evidence to new site. *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986); *Matter of K-*, 5 I&N Dec. 347 (BIA 1953).

There is no discretionary error for the judge to deny or defer ruling on a motion to change venue until removability determined and only if the alien appears to be eligible for relief. See *Matter of Chow*, 20 I&N Dec. 647, 652 (BIA 1993). "The requirement is not met when an Immigration Judge determines that the alien is removable based solely on his or her admission to the factual allegations, as the regulation is specific in requiring an admission to the charges of removability. 8 C.F.R. Section [1]240.10(c)." *Matter of A-P-*, 22 I&N Dec. 468, 472 (BIA 1999).

The fact that Respondent requested a change of venue didn't relieve him of his obligation to appear at the

hearing at the appointed date and time prepared to go forward with the case. See *Matter of Rivera*, 19 I&N Dec. 688, 690 (BIA 1988); *Matter of Patel*, 19 I&N Dec. 260, 262 (BIA 1985), aff'd 803 F.2d 804 (5th Cir. 1986). Respondent could not merely assume that a motion for a venue change would be granted, or would result in a continuance. See *Matter of Rivera*, supra.

Counsel's Professional Conduct

Respondent's attorney is obliged to conduct himself in a professional manner consistent with relevant regulations. 8 C.F.R. Section 1003 Subpart G. "An adjudicating official . . . may impose disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so. It will be in the public interest to impose disciplinary sanctions against a person has engaged in . . .unprofessional conduct, or in frivolous behavior, as set forth in [8 C.F.R.] Section 1003.102." 8 C.F.R. Section 1003.1101(a).

A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay. Actions that, if taken improperly, may be subject to disciplinary sanctions include, but are not limited to, the making of an argument on any factual or legal questions, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal. The signature of a practitioner on any filing, application, motion, appeal, brief, or other document constitutes certification by the signer that the signer has read the filing, application, motion, appeal, brief, or other document and that, to the best of the signer's knowledge, information, belief, formed after

inquiry reasonable under the circumstances, the document is well-grounded in fact and is warranted by existing law or by a good faith argument for the establishment of ne law, and is not interposed for any improper purposed.

8 C.F.R. Section 1003.102(j)(i).

Argument

Respondent filed her affidavit. ROP Exhibit 5, tab A. She states, *inter alia*, that she "never received notice of and was unaware that I had an Immigration Hearing in San Antonio, Texas on November 1, 2007." Id. at Paragraph 4.

Analysis

Respondent's Motion to Reopen fails to comply with mandated content requirements of C.F.R. Section 1003.23(b)(1)(i). It fails to comply LOP regarding an index, properly placed certificate of service, and specific content of the certificate of service.

Respondent's Motion to Reopen and her affidavit provide minimal information. Such leaves more questions unanswered, because the relevant questions are not addressed.

Respondent does not state that she had difficulty understanding the explanation about the charging documents. *Matter of M-D-*, 23 I&N Dec. 540, 545 (BIA 2002); *Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998). She does not state that she was confused for any reason in understanding her obligation to provide a change of address when she went to Arlington, VA two days later.

Id.; ROP Exhibit 5, tab A, at 1, Paragraph 3. The Court notes that Respondent did not timely file a change of address (Form EOIR-33) within the requisite five day period and years later she still has not done so. The Court notes that Respondent's affidavit (*id.*) is in English as her Form I-589 (*id.* at tab B) without any Spanish version or translation. *Matter of S-M-*, supra.

Not addressed is why it took years for Respondent to contact the Court. See generally *Matter of J-P-*, 22 I&N Dec. 33, 35 (BIA 1998) (factor, not statutory requirement), citing to *De Morales v. INS* 116 F.3d 145 (5th Cir. 1997). There is no claim that Respondent's lack of assistance immediately after entry (ROP Exhibit 5, tab A, at 1, Paragraph 5) prevented her from complying with any of her obligations to the Court or lasted for any specific period of time. Respondent's removal hearing was held over two months after she entered and it has taken her years to begin to address her illegal status.

Form I-213 reflects that Respondent "claims that she is going to reside with her uncle URQUILLA, Jose who resides in Houston, Texas. Subject was unable to provide a U.S. address or telephone number." ROP Exhibit 2 at 2. This is directly contradictory to Respondent's claim that "no one in the community will help me." ROP Exhibit 5, tab B, at 1, Paragraph 5. Respondent has neither explained her use of an alias nor provide evidence of her true identity. Respondent's credibility is at issue and it cannot be resolved in her favor.

"[The] statutory scheme as a whole contemplates that [Respondent] . . . will make reasonable efforts to avoid the entrance of [an] *in absentia* order [ ]." *De Morales v. INS, supra,* at 148 (italics in original). Nothing

reasonable is argued or evidenced by Respondent as to what happened prior to the entry of an in absentia order.

Respondent's Form I-589 reflects that she immediately began working in September 2004, continued with that job through July 2005, moved to another job for three months, and then worked until September 2006 and yet another job. ROP Exhibit 5, tab B, at 4, question 4. The Court must conclude that had numerous resources that became available to her and underscores that Respondent has failed to provide "detail that would enable [the Court] to meaningful evaluate [her] claim. *Matter of S-A-*, 21 I&N Dec. 1050, 1051 (BIA 1997).

Findings of Fact and Conclusions of Law

After a careful review of the record and "look[ing] to the 'totality of circumstances' to resolve th[e] issue of exceptional circumstance" (*Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) the Court makes the following findings of fact and conclusions of law:

I FIND that the Court has continuing jurisdiction over the subject matter and Respondent in these proceedings based on the proper issuance, service and filing of a Notice to Appear.

I FIND that no issue of law or fact remain unresolved;

I FIND Respondent timely filed a motion to reopen, with the appropriate fees.

I FIND that no notice for the scheduled master calendar hearing was provided to Respondent because she has never timely, properly, given her address to the Court for such.

I FIND that the sole reason Respondent did not receive notice of the scheduled hearing was her fault and she has not shown otherwise.

I FIND that Respondent had no pending motion that justified and excused her appearance from the scheduled hearing.

I FIND that Respondent has not shown an exceptional circumstance beyond her control prevented an appearance in court and she is now time barred from doing so.

I FIND that Respondent's Motion to Reopen should be denied.

I FIND that Respondent's Motion for Change of Venue should be denied, however, had proceedings been reopened venue to Arlington, VA would have been granted.

Orders

Accordingly, the following orders are entered.

IT IS ORDERED that Respondent's Motion to Reopen be DENIED.

IT IS ORDERED that Respondent's Motion for Change of Venue is DENIED.

IT IS ORDERED that any reference to the Immigration and Naturalization Service or INS shall mean the Department of Homeland Security or DHS.

Dated: June 25, 2006.

Signature

JOHN D. CARTE
United States Immigration Judge

APPENDIX B – OPINION OF THE BOARD OF IMMIGRATION APPEALS DECIDED APRIL 25, 2008

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File A98 486 507 – San Antonio, TX Date April 25 2008

In Re: JASMIN ESMERALDA CORTEZ-URQUILLA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Orlando Gamarra, Esquire

APPLICATION: Reopening

ORDER:
PER CURIAM. The respondent was ordered removed from the United States on November 1, 2004, because she failed to appear for a hearing. She filed a motion to reopen on June 4, 2007, but the Immigration Judge denied it on June 25, 2007.[1] This appeal followed. The appeal will be dismissed.

---

[1] The Immigration Judge indicates that his decision was issued on June 25, 2006. It appears that a typographical error in the date of the decision.

The respondent argues on appeal that she did not receive the Notice of Hearing. However, the respondent received personal service of the Notice to Appear. She was advices therein and by an immigration officer in Spanish of her obligation to inform the Immigration Court of her address. The respondent did not provide a her address to the Immigration Court, and therefore, she was not entitled to be notified of the hearing. See section 240(b)(5)(B) of the Immigration and Nationality Act, 8 U.S.C. Section 1229a(b)(5)(B). We agree with the Immigration that the notice requirements have been satisfied in these proceedings.

The respondent further argues on appeal that exceptional circumstances prevented her from appearing for her hearing. She indicates in her declaration that she was only 21 years old when she entered the United States and did not have anyone to help her understand her immigration obligations. The respondent's motion is untimely to the extent that she argues that confusion prevented her from proving her mailing address to the Immigration Court and attending her hearing. See section 240(b)(5)(C) of the Act, 8 U.S.C. Section 1229a(b)(5)(C). The respondent has also abandoned her opportunity to seek asylum, withholding of removal, or protection under the Convention Against Torture. She further does not allege that there are materially changed conditions or circumstances in El Salvador to warrant the consideration of her application See *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953 (BIA 1999). The Board also does not find that an exceptional situation exists herein to warrant the reopening of these proceedings sua sponte. See *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). The Immigration Judge's decision is affirmed.

Accordingly, the appeal is dismissed.

Signature
FOR THE BOARD

APPENDIX C – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED DECEMBER 5, 2008

Case: 08-60925 Document 0051406093 Page: 1 Date Filed: 12/05/2008

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

December 5, 2008

Mr. Thomas Ward Hussey
Director
US Department of Justice
Office of Immigration Litigation
PO Box 878
Ben Franklin Station
Washington, DC 20044

No 08-60925 Cortez-Urquilla v. Mukasey
USDC No. A 98 486 507

Enclosed is a certified copy of the judgment issued as the mandate.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: _____
Nancy Dolly, Deputy Clerk
504-310-7683

cc: w/encl:
Mr. Michael Hadeed, Jr
Ms. Lindsay B Glauner
Mr. Mario R Ortiz

MDT-1

Case: 08-60925 Document: 0051454970 Page: 1 Date Filed: 12/05/2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60925

JASMIN ESMERALDA CORTEZ-URQUILLA
Petitioner

v.

MICHAEL B MUKASEY, US ATTORNEY GENERAL
Respondent

- - - - - - - - - - - -

Petition for Review of an Order of the Board of Immigration Appeals

- - - - - - - - - - - -

CLERK'S OFFICE:

Under 5th Cir. R. 42.3, the petition for review is dismissed as of December 5, 2008 for want of prosecution. The petitioner failed to timely file brief.

CHARLES R. FULBRUGE III
Clerk of the United States Court of Appeals for the Fifth Circuit

BY: _____
Nancy Dolly, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

DIS-2

APPENDIX D – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED SEPTEMBER 9, 2009

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

September 9, 2009

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 08-60925 Cortez-Urquilla v. Mukasey
USDC No. A98 486 507

The court has denied petitioner's motion to reinstate the appeal.

CHARLES R. FULBRUGE III, Clerk
By: _____
Nancy Dolly, Deputy Clerk
504-310-7683

Ms. Lindsay B Glauner
Mr. Thomas Ward Hussey
Mr. Mario R Ortiz
Mr. Ivan Yacub

Motion Notice – MOT2

No. 09-942

In the Supreme Court of the United States

JASMIN ESMERALDA CORTEZ-URQUILLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
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QUESTION PRESENTED

Whether the clerk of the court of appeals erred by denying a motion to reinstate a petition for review dismissed for want of prosecution.*

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* By letter of March 26, 2010, the Court requested "that a response be filed for Question Presented No. 2 only."

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In the Supreme Court of the United States

No. 09-942

JASMIN ESMERALDA CORTEZ-URQUILLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the clerk of the court of appeals dismissing the petition for review (Pet. App. 17-19) and denying petitioner's motion to reinstate (Pet. App. 20) are unreported. The order of the Board of Immigration Appeals (Board) (Pet. App. 14-16) and the decision of the immigration judge (Pet. App. 1-13) are unreported.

JURISDICTION

The order of the court of appeals was entered on September 9, 2009. The petition for a writ of certiorari was filed on December 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien who fails to appear at her removal proceeding "shall be ordered removed in absentia" if the

government establishes that she was provided with written notice of the proceeding and that she is removable. 8 U.S.C. 1229a(b)(5)(A). However, it is the alien's obligation to provide the government and the immigration court with an address to which notice of the proceedings can be sent. 8 U.S.C. 1229(a)(1)(F); 8 C.F.R. 1003.15(d) (requiring alien to provide an address and telephone number within five days of service of a charging document). If the alien "fails to provide his or her address as required under [8 C.F.R.] 1003.15(d), no written notice shall be required for an Immigration Judge to proceed with an *in absentia* hearing." 8 C.F.R. 1003.26(d); see 8 U.S.C. 1229a(b)(5)(B) (same).

An alien who has been ordered removed *in absentia* may file a motion to reopen with the immigration judge (IJ) to rescind that order. 8 U.S.C. 1229a(b)(5)(C); 8 C.F.R. 1003.23(b)(4); see *In re Guzman*, 22 I. & N. Dec. 722, 723 (B.I.A. 1999) (Board lacks jurisdiction to review an *in absentia* removal order unless the alien first files a motion to reopen with the IJ to rescind the order.). An alien can prevail on such a motion to reopen only if she demonstrates that her failure to appear was the result of exceptional circumstances beyond her control; that she did not receive proper notice of the hearing; or that she was in federal or state custody and the failure to appear was not her fault. 8 U.S.C. 1229a(b)(5)(C) and (e)(1); 8 C.F.R. 1003.23(b)(4)(ii). A motion to reopen based on exceptional circumstances must be filed within 180 days of the order of removal. 8 U.S.C. 1229a(b)(5)(C)(i); 8 C.F.R. 1003.23(b)(4)(ii).

2. Petitioner is a native and citizen of El Salvador. Pet. App. 2. She entered the United States without inspection near Eagle Pass, Texas, in August 2004. Pet. 1;

Pet. App. 2. She was quickly apprehended. Administrative Record (A.R.) 12.

While petitioner was in custody, the Immigration and Naturalization Service (INS) served her with a Notice to Appear charging her with being removable as an alien present in the United States without being admitted or paroled after inspection.[1] Pet. App. 2; see 8 U.S.C. 1182(a)(6)(A)(i). The Notice to Appear did not indicate the date and time of petitioner's hearing, Pet. 1, but it did explain that petitioner was required to provide the government and the immigration court with a mailing address to which hearing notices would be sent, Pet. App. 2. In addition, petitioner was told in Spanish of her obligation to notify the immigration court of her address, *id.* at 15, and of the consequences of failing to appear, *id.* at 2. Petitioner told the INS that she was planning to live with her uncle in Houston, but did not know his address or phone number. *Id.* at 10. After the INS released her on her own recognizance, petitioner went instead to Arlington, Virginia, but never notified the government or the immigration court of her address there. Pet. 6-7; Pet. App. 9. On November 1, 2004, the immigration court in San Antonio, Texas, ordered petitioner removed *in absentia*. Pet. 1; Pet. App. 3.

3. On May 25, 2007, petitioner filed a motion to reopen, alleging that she did not receive proper notice of her removal hearing. Pet. 1; A.R. 65-67. The motion stated that petitioner wished to apply for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10,

[1] The INS's immigration-enforcement functions have since been transferred to the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. A.R. 66.[2] The IJ denied the motion to reopen as untimely. Pet. App. 1-13. The IJ noted that petitioner's motion to reopen was filed more than 180 days after the 2004 order of removal was entered, making her ineligible to claim that an exceptional circumstance prevented her appearance at her removal proceeding—and that in any event, no such exceptional circumstance existed. *Id.* at 6, 12. And because petitioner failed to supply her U.S. address, "the Court could not and had no obligation to send [petitioner] written notice of the calendared hearing." *Id.* at 2-3; see *id.* at 12 (finding that the "sole reason [petitioner] did not receive notice of the scheduled hearing was her fault"). The IJ therefore denied the motion to reopen. *Id.* at 12.

4. The Board affirmed the immigration judge's decision and dismissed petitioner's appeal. Pet. App. 14-16. The Board agreed with the IJ that by virtue of her failure to provide an address, petitioner "was not entitled to be notified of the [removal] hearing." *Id.* at 15. The Board also explained that by failing to timely challenge the *in absentia* removal order, petitioner "has also abandoned her opportunity to seek asylum, withholding of removal, or protection under the Convention Against Torture. She further does not allege that there are materially changed conditions or circumstances in El Salvador to warrant the consideration of her application."

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[2] Petitioner submitted an I-589 asylum application with her motion to reopen. A.R. 73-83. The gravamen of her asylum application was that in El Salvador, she was raped and abused by her boyfriend, a member of a notorious gang from whom the authorities could not protect her if she returned. A.R. 78, 83. She claimed that her abuser had since threatened to kill her, and had come to the United States looking for her. A.R. 83.

Ibid. (citing *In re A-N-*, 22 I. & N. Dec. 953 (B.I.A. 1999)). Finally, the Board found that no exceptional situation warranted *sua sponte* reopening. *Ibid.*

5. On May 27, 2008, petitioner filed a petition for review in the United States Court of Appeals for the Fourth Circuit. 08-1611 Docket entry No. 1. Petitioner was represented by attorney Michael Hadeed of Springfield, Virginia. Mr. Hadeed had not represented petitioner before the immigration courts. On June 30, 2008, Mr. Hadeed filed a motion to withdraw, stating that, "after diligent research, counsel has determined that there are no legal grounds on which to base a Petition for Review." Hadeed Mot. to Withdraw 1, Docket entry No. 7. Mr. Hadeed's motion to withdraw was granted on July 1, 2008. Docket entry No. 8. On July 21, 2008, petitioner's current counsel, Ivan Yacub, took over her representation in the Fourth Circuit and entered his appearance. Docket entry No. 17.

Shortly after Mr. Hadeed withdrew, the government moved to dismiss the petition because it was filed in the wrong venue. The relevant statute (8 U.S.C. 1252(b)(2)) requires a petition for review to be filed "with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings"—here, the Fifth Circuit, not the Fourth. On September 29, 2008, at Mr. Yacub's urging, the Fourth Circuit denied the government's motion to dismiss and entered an order transferring the case to the Fifth Circuit. Order Denying Mot. to Dismiss, Docket entry No. 23.

6. On October 2, 2008, the Fifth Circuit docketed the transferred petition as No. 08-60925. Five days later, the administrative record was filed with the clerk, and a briefing schedule issued requiring petitioner's opening brief to be filed by November 17, 2008. 08-60925 Docket

entry No. 3. However, the briefing schedule was erroneously addressed and sent to Mr. Hadeed, petitioner's former lawyer, rather than to Mr. Yacub.[3] Petitioner alleges (Pet. 3) that Mr. Yacub was never notified of the briefing schedule, and therefore did not file a brief by the due date. On December 5, 2008, a Clerk Order of the Fifth Circuit dismissed the petition for review "for want of prosecution" pursuant to Fifth Circuit Rule 42.3. Pet. App. 19.

Nine months later, on September 9, 2009, petitioner (through Mr. Yacub) filed an unopposed motion to reinstate the petition for review and set a new briefing schedule in the case. Pet'r Mot. to Reinstate Pet. for Review (Reinstatement Mot.) 1-3. It was not accompanied by a brief on the merits to be filed instanter. The motion represented that "[o]n August 10, 2009, present counsel called [the Fifth Circuit] to inquire about this case. In that phone conversation with the Clerk's Office, counsel learned that this case was dismissed on December 5, 2008." *Id.* at 3. The motion stated that neither Mr. Yacub nor petitioner was notified of, or aware of, the previous briefing schedule. *Id.* at 2-3. Mr. Yacub did not attach a supporting declaration or affidavit under oath, but he did sign the motion. *Id.* at 3.

The same day (September 9, 2009), a Clerk Order issued denying the motion to reinstate the petition. Pet. App. 20. Under Fifth Circuit Rule 27.1, petitioner was entitled to seek reconsideration of the clerk's decision before a single judge of the court of appeals, but did not.

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[3] The Fifth Circuit's docket sheet contains an entry for September 9, 2009, stating: "ATTORNEY NOT PARTICIPATING. Michael Hadeed is designated as inactive in this case. Reason: added erroneously at case opening."

Petitioner filed a petition for a writ of certiorari on December 8, 2009.

ARGUMENT

The order below does not merit this Court's review. The court of appeals' unpublished Clerk Order does not conflict with a decision of another court of appeals. Moreover, petitioner's remedy of first resort was to obtain reconsideration of the clerk's decision before a single judge of the court of appeals, as the Fifth Circuit's rules provide, not to seek certiorari in this Court. Petitioner contends (Pet. 15-17) that the order of the clerk of the court of appeals denying her motion to reinstate her petition for review was manifestly unjust. Although the government did not oppose petitioner's motion for reinstatement in the court of appeals and agrees that reinstatement of the petition for review would have been within the court's discretion, petitioner has not shown manifest injustice and has not demonstrated circumstances warranting an exercise of this Court's supervisory power. She has not demonstrated her own diligence in preserving her petition for review or any prejudice to a meritorious immigration claim. Further review is therefore unwarranted.

1. Petitioner's failure to seek judicial reconsideration of the clerk's denial of her reinstatement motion furnishes a sufficient basis for denying the certiorari petition. Under the Fifth Circuit's relevant local rule, when an appellant fails to file a brief, "the clerk must dismiss the appeal for want of prosecution." 5th Cir. R. 42.3.2. If the appellant moves to reinstate the appeal, the clerk has discretion to rule on the motion himself or else to refer it to the court. 5th Cir. R. 27.1.6; see Fed. R. App. P. 27(b) (permitting the court of appeals to "au-

thorize its clerk to act on specified types of procedural motions"). In ruling on the motion, the clerk must apply "the standards set forth in the applicable rules." 5th Cir. R. 27.1. The clerk's decision is then subject to review by the court. Thus, the Federal Rules of Appellate Procedure specify that "[a] party adversely affected by * * * the clerk's[] action may file a motion to reconsider, vacate, or modify that action." Fed. R. App. P. 27(b). In the Fifth Circuit, "[t]he clerk's action is subject to review by a single judge upon a motion for reconsideration." 5th Cir. R. 27.1. In a civil case to which the government is a party, such a motion may be made within 45 days. *Ibid.*; see Fed. R. App. P. 40.

By authorizing litigants to obtain relief from a single circuit judge, Fifth Circuit Rule 27.1 provides an expeditious remedy for grievances with the clerk's office. A single judge can resolve such routine procedural motions with a minimal expenditure of judicial resources. Allowing petitioner to bypass that procedure in favor of a petition for a writ of certiorari is especially inappropriate in the immigration context, in which "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Stone* v. *INS*, 514 U.S. 386, 400 (1995) (quoting *INS* v. *Doherty*, 502 U.S. 314, 323 (1992)).

Moreover, as the petition in this case demonstrates, a one-sentence order from the clerk provides no basis for meaningful review by this Court. Had petitioner sought reconsideration as Fifth Circuit Rule 27.1 contemplates, the reviewing judge, to the extent warranted, could have provided a reasoned explanation of the judge's decision to grant or deny the motion. See, *e.g.*, *Bennett* v. *Mukasey*, 525 F.3d 222 (2d Cir. 2008) (Newman, J., in chambers) (explaining decision to grant rein-

statement of a defaulted petition for review). By contrast, the clerk's order in this case contains no discussion (see Pet. App. 20), and accordingly evinces no conflict with any decision of this Court or another court of appeals. Nor can petitioner plausibly contend that the clerk's decision "call[s] for an exercise of this Court's supervisory power," Sup. Ct. R. 10, rather than the supervision of the judges of the court of appeals. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, 'not of first view.'") (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

2. The courts of appeals have "discretion to reinstate an appeal that has been dismissed for appellate default." *Wapnick* v. *Commissioner*, 365 F.3d 131, 131 (2d Cir. 2004) (per curiam) (citing Fed. R. App. P. 2); see 16A Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction and Related Matters* § 3948 & n.14 (4th ed. 2008). That discretion derives from Rule 2 of the Federal Rules of Appellate Procedure, which authorizes the court of appeals to "suspend any provision of [the Rules] in a particular case," in order "to expedite its decision or for other good cause." Fed. R. App. P. 2.

Petitioner contends that her motion for reinstatement should have been granted to prevent "manifest injustice." Pet. 15 (citing Fed. R. App. P. 2). The commentary to Rule 2 acknowledges that the Rule "contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result." Fed. R. App. P. 2 advisory committee's note (1967); see *Lattanzio* v. *COMTA*, 481 F.3d 137, 139 (2d Cir. 2007) (court may reinstate defaulted appeal for good cause or to prevent manifest injustice). To establish manifest injustice, courts usually require a

showing of diligence on the part of the complaining party, see, *e.g.*, *Robinson* v. *Wix Filtration Corp. LLC*, 599 F.3d 403, 408-409 (4th Cir. 2010) (considering manifest injustice under Fed. R. Civ. P. 59(e)); *Fox* v. *American Airlines, Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004) (under Rule 59(e), no manifest injustice when dismissal of suit "could have been avoided through the exercise of due diligence"), along with prejudice to a potentially meritorious claim, see, *e.g.*, *Lattanzio*, 481 F.3d at 139 ("Manifest injustice can result when the denial of the motion to reinstate bars an otherwise meritorious claim.").

The government agrees that when an otherwise diligent appellant is unaware of the briefing schedule due to the court's error, there will normally be grounds to reinstate the appeal if it is later dismissed for failure to file a brief. See *United States* v. *Anderson*, 921 F.2d 335, 338-339 (1st Cir. 1990) (despite local rule requiring clerk to dismiss government appeal for want of prosecution, good cause existed under Fed. R. App. P. 2 to permit the appeal because the government did not receive the briefing schedule). In this case, the clerk's error in sending the briefing schedule to the wrong lawyer may have justified reinstatement of the petition upon the filing of an appropriate motion. But in light of petitioner's failure to establish her own diligence or any prejudice to a meritorious immigration claim, the clerk's decision to deny reinstatement was not an abuse of discretion.

a. Petitioner alleges (Pet. 16) that it is "evident from the record" that her "brief was not timely filed because of an error arising out of the Fifth Circuit * * * , not because of any delay caused by [petitioner]." But petitioner's lack of responsibility for delay is not so clear. Nowhere has petitioner explained why her current coun-

sel, after securing the transfer of this case from the Fourth Circuit to the Fifth Circuit on October 2, 2008, did not inquire with the latter court about a briefing schedule until ten months later, on August 10, 2009. Even though the clerk failed to send Mr. Yacub a copy of the briefing schedule, counsel could have checked the court's docket during that ten-month period. Cf. *United States ex rel. McAllan* v. *City of New York*, 248 F.3d 48, 53 (2d Cir. 2001) (noting counsel's obligation to check the court's docket and be aware of relevant deadlines). Nor has petitioner explained why she waited 30 days after discovering the dismissal before filing a three-page reinstatement request, unaccompanied by either a brief curing the deficiency or a proffered date by which a brief would be filed. See Reinstatement Mot. 1-3; cf. 5th Cir. R. 27, internal operating procedure.[4] The absence of such a brief left the reader of the motion—either the clerk's office or a judge, to whom the motion could have been referred—without any substantial argument on the merits of petitioner's underlying immigration claim, which can be a material factor in assessing manifest injustice.

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[4] The Fifth Circuit's internal operating procedure (IOP) for Rule 27, which is appended to the end of the Rule, "provides the general sense of the court on the disposition" of motions to reinstate an appeal. 5th Cir. R. 27, IOP. The IOP cautions that the court "normally will not reinstate a case dismissed by the clerk under 5th Cir. R. 27.1.6 unless: [t]he deficiency which caused the dismissal has been remedied; and [t]he motion for reinstatement is made as soon as reasonably possible and in any event within 45 days of dismissal." *Ibid.* Although the IOP is not binding on the court, a party's promptness in bringing the error to the court's attention and curing any underlying deficiency (here, by filing a brief with the motion) are undoubtedly appropriate factors to guide the exercise of the court's discretion.

b. Petitioner has also failed even in this Court to show prejudice to a meritorious immigration claim. The Board and the IJ correctly recognized that an alien, like petitioner, who fails to provide the required address after being advised of her obligation to do so cannot insist upon notice of her *in absentia* removal hearing. Pet. App. 2-3, 15; 8 U.S.C. 1229a(b)(5)(B); 8 C.F.R. 1003.26(d); see *Shia* v. *Holder*, 561 F.3d 19, 21 (1st Cir. 2009) (upholding Board's denial of motion to reopen *in absentia* removal order when alien failed to furnish address); *In re Villalba*, 21 I. & N. Dec. 842, 845 (B.I.A. 1997) (notice requirements in charging document and notice of hearing reasonably construe Congress's mandate "that no hearing notice is required where an alien fails to provide the required address information").[5] Petitioner asserts (Pet. 7) that she had no obligation to update her address because the date of her removal hearing was not listed on the Notice to Appear. The clear text of the relevant regulation and statute establish otherwise. 8 C.F.R. 1003.15(d) ("If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted."); see 8 U.S.C. 1229(a)(1)(F) (noting "[t]he requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an ad-

[5] *Villalba* cited Section 242B(c)(2) of the Immigration and Nationality Act, which applied to that case. 21 I. & N. Dec. at 845. That section was repealed in 1996, but the same mandate continues to exist at 8 U.S.C. 1229a(b)(5)(B).

dress and telephone number (if any) at which the alien may be contacted respecting [removal] proceedings"). Accordingly, there is no substantial likelihood that the court of appeals would have granted the petition for review, and petitioner does not seriously contend otherwise.

Under these circumstances, petitioner cannot demonstrate that the clerk's decision not to reinstate her petition for review amounted to manifest injustice.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

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[6] Petitioner alleges (Pet. 16) that manifest injustice is also shown by the "aggravating factor" that her former attorney, Mr. Hadeed, has been convicted of immigration fraud. But she does not explain the relevance of Mr. Hadeed's misconduct to her petition. Petitioner implies that Mr. Hadeed did not inform her or her current counsel of the briefing schedule addressed to him by the Fifth Circuit. Pet. 2-3. But Mr. Yacub told the Fifth Circuit that both he and petitioner were unaware of the briefing schedule, Reinstatement Mot. 2-3, and there is no reason to conclude that the court of appeals disbelieved that representation.